Supreme Court, U.S.
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No. 04-1511

In The Supreme Court of the United States

CITY OF NEW ROCHELLE, et al.,

Petitioners,

v.

CROWN COMMUNICATION NEW YORK, INC., and THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NEW YORK,

Respondents.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Crown Communication New York, Inc. is a wholly-owned subsidiary of Crown Castle International Corporation, its parent corporation, which is publicly traded on the New York Stock Exchange under ticker symbol "CCI."

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BRIEF IN OPPOSITION

Respondent Crown Communication New York, Inc. ("Crown") respectfully asks this Court to deny the Petition seeking review of the Decision of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. 1a-20a) is officially reported at 824 N.E.2d 934 (N.Y. 2005). The opinion of the Supreme Court of the State of New York Appellate Division, Second Department (Pet. App. 21a-25a) is reported at 765 N.Y.S.2d 898 (App. Div. 2003). The June 28, 2002, Decision and Order of the Supreme Court of the State of New York, County of Westchester (Pet. App. 55a-57a) is unreported.

JURISDICTION

The opinion of the New York Court of Appeals is dated February 10, 2005. The instant Petition for a writ of certiorari was filed in this Court on May 6, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. As explained in detail below, however, the second question presented by Petitioner concerning preemption was not properly presented to or decided by the lower courts. Thus, this Court lacks jurisdiction to deal with the second question presented.

STATEMENT OF THE CASE

In 1997, the New York State Police, on behalf of itself and certain other participating New York State agencies (collectively, the "State"), entered into the Telecommunications Site Manager Service Agreement (the "TSMA" or the "Agreement") with Castle Tower Holding Corporation ("Castle"). The purpose of the TSMA is to develop the infrastructure needed to support the State's current and future wireless telecommunications needs, to coordinate requests from wireless telecommunications providers to install their public utility antennas[1] on the State's infrastructure in furtherance of promoting the rapid deployment of wireless telecommunications service consistent with the federal Telecommunications Act of 1996 (the "TCA"), and to reduce the proliferation of new tower structures across the State through shared use of the State's existing tall structures and wireless infrastructure. To that end, pursuant to the TSMA, Castle has an exclusive license to construct and operate telecommunications facilities on State-owned lands and rights-of-way. The State is the legal and equitable owner of these towers and has the right and first choice to install its communications equipment on them. Castle is further authorized as the State's agent to license space on the State's towers to localities and commercial wireless telecommunications providers. Castle assigned the Agreement to Crown in 1998.

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[1] The New York Court of Appeals has held that wireless telecommunications providers are public utilities because wireless telecommunications services are essential to the public good. *See Cellular Tel. Co. v. Rosenberg*, 624 N.E.2d 990, 993 (1993).

Subsequently, Crown identified two potential locations for towers on State-owned property within the City of New Rochelle (the "City"), and the State granted Crown approval to commence a preliminary site evaluation for the construction of both towers. The first tower was to be a 120-foot tall monopole, which would replace an existing 110-foot tall lattice communications tower located on a New York State Department of Transportation ("DOT") right-of-way (the "Replacement Tower"). The second was a new structure, which was to be erected at a DOT maintenance yard (the "Yard Tower"). Both sites are situated along a heavily-trafficked thoroughfare – the Hutchinson River Parkway.

In May 2000, Crown informed the City of the two proposed towers. The following month, Crown and the State gave a public presentation to the Mayor and City Council regarding the purpose and intended use of the two proposed towers. At this meeting, the City voiced no objection to the siting or construction of the towers, and otherwise submitted no comments on the proposal. The State and Crown also offered space on the facilities to the municipality for use by its public safety agencies, which invitation was reiterated in correspondence sent to the City. Subsequently, the DOT performed an environmental review of both sites under the New York State Environmental Quality Review Act, *see* 6 N.Y. Comp. Codes R. & Regs. tit. 6, § 617 *et seq.*, and issued a "negative declaration" for each location, finding that neither the Replacement Tower nor the Yard Tower would result in any significant adverse environmental or aesthetic impact based on the nature and location of the sites.

Crown proceeded with the construction of the towers and entered into license agreements with a number of

commercial wireless telecommunications providers to lease space on the towers for their equipment. After the Yard Tower was completed and during construction of the Replacement Tower, the City issued a stop work order, contending that the towers were subject to the City's zoning laws and that Crown must therefore apply for a special permit from the City's planning board.

In 2001, Crown commenced separate proceedings for each of the towers seeking a judgment prohibiting the City from enforcing its zoning regulations to halt construction of the towers and a declaration that the towers are exempt from the local zoning regulations. After consolidating the two matters, Supreme Court, County of Westchester employed the well-settled "balancing of public interests" test adopted by the New York Court of Appeals in *County of Monroe v. City of Rochester*, 530 N.E.2d 202 (N.Y. 1988), to determine whether the governmental land-use at issue should be subject to local zoning. Initially, the court declared the towers immune from local zoning regulations and enjoined the City from interfering with their construction and operation (Pet. App. 26a-33a).[2] Following the City's motion for reargument, the court modified its prior order to the extent that it held that antennas of the commercial telecommunications providers to be attached to the towers were subject to local zoning regulation. The court otherwise adhered to its original determination that

[2] The City served a notice of appeal from the resulting Order, but the City failed to perfect the appeal. As a result, the appeal was dismissed by the Appellate Division, Second Department on November 6, 2002.

the State's towers were not subject to local zoning regulation (Pet. App. 55a-57a).[3]

Relying on the *County of Monroe* test, the Appellate Division, Second Department unanimously modified Supreme Court's determination by declaring that the commercial wireless telecommunications antennas are not subject to local zoning regulation and otherwise affirmed. *See* 765 N.Y.S.2d at 900. As relevant here, the Appellate Division further held that the TCA does not "mandate compliance with local zoning regulations under the circumstances herein." *Id.* at 901.

The New York Court of Appeals affirmed the Decision of the Appellate Division. Applying its *County of Monroe* test, the Court of Appeals held that the wireless telecommunications providers' antennas attached to the State's towers are within the immunity from local regulation that the State's towers enjoy. *See* 824 N.E.2d at 938-940. The Court of Appeals further held that this immunity does not conflict with the TCA. Specifically, the Court held that, although "the TCA may not limit a government's zoning ability, it does not dictate that a locality's regulations trump State interests where competing interests exist." *Id.* at 939-940. Rather, consistent with *County of Monroe*, the Court of Appeals held that the commercial wireless telecommunications providers' antennas are "embraced within the immunity already afforded to the state-owned towers pursuant to the balancing test." *Id.* at 940.

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[3] Because the City failed to challenge the immunity of the towers themselves on appeal, their exemption from local zoning regulation was not at issue below and is not before this Court. *See* 530 N.E.2d at 937 n.2.

Both towers are now fully operational and host communications equipment belonging to both the State and certain commercial wireless telecommunications providers. As a result, the towers provide basic and emergency wireless telecommunications services to the many travelers on the Hutchinson River Parkway, local residents, and emergency service personnel via both governmental and public utility wireless telecommunications antennas. *See id.* at 936 n.1.

Notwithstanding the recognized public benefit derived by the community from construction and operation of the State's towers and the governmental and public utility wireless telecommunications antennas they support, *see Rosenberg*, 624 N.E.2d at 993, the City now petitions this Court seeking review of the Decision of the New York Court of Appeals.

REASONS FOR DENYING THE PETITION

This Court's Decisions and Rules have long required that, where review of a state-court judgment is sought, a petitioner must show that the subject federal question was raised, preserved, and passed upon in the state courts below. *See, e.g., Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); Sup. Ct. R. 14(g)(i); *see also* 28 U.S.C. § 1257. Even if these jurisdictional prerequisites are satisfied, this Court's "considerations governing review on certiorari" are stringent: "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. As relevant here, these considerations include whether a state court has decided "an important

question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), or whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort." Sup. Ct. R. 10(b).

In its Petition, the City seeks review of two purported federal questions. The first question presented is whether the Decision of the New York Court of Appeals "exempting private telecommunications facilities located on state-owned land from local regulations [is] inconsistent with the Telecommunications Act." (Pet. at i). The second question presented is whether the State is "preempted by the Telecommunications Act from extending its' [sic] zoning immunity to certain telecommunications providers located on state-owned land to the clear disadvantage of other carriers required to comply with local zoning on order to operate in New Rochelle." *Id.*

As demonstrated in detail below, given the utter lack of merit to the City's first purported federal question, the New York Court of Appeals did not decide an important question of federal law in rejecting this claim. Nor is there, as the City claims, a split among state courts of last resort on this issue. Further, as explained below, the City's second purported federal question was not presented to or – by its own admission (Pet. at 3) – never passed upon in the State courts below. As such, this Court lacks jurisdiction to deal with this particular issue. In any event, this issue is without merit. Finally, there are no other "compelling reasons" to grant certiorari. Thus, the City's Petition for a writ of certiorari should be denied in its entirety.

I. The New York Court Of Appeals Did Not Decide An Important Question Of Federal Law, And Its Opinion Does Not Conflict With Relevant Decisions Of This Court

Purportedly relying on 47 U.S.C. §§ 332(c)(7) and 253(c) in its discussion of the first purported federal question, the City opines that the TCA "requires facilities located on government property to comply with local regulations." (Pet. at 9). From this creaky foundation, the City advances an argument that the Decision of the New York Court of Appeals holding that the commercial wireless telecommunications providers' equipment is embraced within the immunity already afforded to the State-owned towers pursuant to the *County of Monroe* test somehow conflicts with the TCA. The City's argument, however, is belied by the plain language of the TCA and is without merit. As such, review by this Court is unwarranted as the New York Court of Appeals did not decide "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Section 332(c)(7)(A) provides: "*nothing in this Act* shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A) (emphasis added). Section 253(c) provides: "*Nothing in this section* affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c) (emphasis added).

Plainly, these provisions merely carve out an exception to the *TCA's preemptive sweep* by preserving state and local jurisdiction – if any – to regulate certain aspects of telecommunications siting. *Cf. Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 637 (2d Cir. 1999). Contrary to the City's argument, neither provision expressly requires local regulation of the placement of wireless communications antennas, nor do the statutes alter the traditional relationship between a state and its political subdivisions. *See Nixon v. Missouri*, 541 U.S. 125, 140 (2004) (holding that the State of Missouri's regulation of wireless telecommunications service by local governments does not violate 47 U.S.C. § 253 because it is incongruous to "interpose[] federal authority between a State and its municipal subdivisions" and federal law should not "trench on the States' arrangements for conducting their own governments"). Thus, where, as here, there is a conflict between a state and locality as to a land use issue, the TCA leaves resolution to state law. In New York, such conflicts are governed by the test articulated in *County of Monroe* and its progeny, which is the framework within which the New York Court of Appeals properly resolved the instant dispute. *See id.*; *see also Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.").

Further, the City's contention that the TCA not only *preserves* state and local law, but that it *requires* that local law be followed instead of state law concerning the siting of telecommunications facilities (Pet. at 9), turns sections 332(c)(7)(A) and 253(c) on their heads by, in essence, federalizing local law such that, pursuant to the Supremacy Clause, local law preempts all state law to the contrary.

Such a radical interpretation of the TCA finds no support in the plain language of the statute, its legislative history, or relevant case law. *See Nixon*, 541 U.S. at 140.

To the extent that the City cites to a concurring opinion of this Court and the TCA's legislative history[4] in purported support of the argument that local laws somehow preempt state law under the TCA, the City's selective quotations are taken out of context. For example, when the City quotes the concurring opinion in *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1463 (2005) (Breyer, J., concurring), that Congress specifically intended that "State and local authorities would remain free to make siting decisions," the City blatantly ignores Justice Breyer's preceding point that this is as opposed to having "a *Federal Communications Commission* wireless tower siting policy that would pre-empt state and local authority." *Id.* at 1462 (emphasis added). The same type of misleading selective quotation by the City also takes place in regard to certain legislative history of the TCA. First, the City quotes Representative Sensenbrenner as stating that "[t]he authority of State and local governments over zoning and land use matters is absolutely essential and must be preserved." 142 Cong. Rec. H1145 (daily ed. Feb. 1, 1996) (statement of Rep. Sensenbrenner). The City disingenuously connects this cherry-picked remark to its argument that the TCA somehow "requires" local law to be followed in siting wireless telecommunications facilities. A review of Representative Sensenbrenner's complete

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[4] Since the plain language of the provisions at issue in the TCA does not support the City's contention, there is no need to even turn to the statute's legislative history. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

remarks on the subject, however, makes clear that he made the above statement in the context of reaffirming his disapproval of a prior bill "that would have allowed the Federal Communications Commission (FCC) to issue rules that would preempt local zoning on where to site cellular communications towers." *Id.* Thus, Representative Sensenbrenner's comments were made, not in support of the bizarre prospect of elevating local law over state law through the TCA, but in support of preserving local law from preemption by the FCC, which is consistent with the concurring opinion in *Abrams*. The second piece of legislative history cited by the City states that section 704 will "prevent[] *Commission preemption* of local and State land use decisions and preserve[] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." (H.R. Conf. Rep. No. 104-458 (1996), at 207-208 (emphasis added). As with Representative Sensenbrenner's remarks, the City attempts to take comments concerned with preserving some local authority from *federal preemption* into support for its incorrect assertion that local law somehow trumps state law. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'").[5]

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[5] Not surprisingly given the utter lack of support from the plain language of the TCA or its legislative history, none of the decisions cited by the City supports the proposition that the TCA mandates that local law be upheld over contrary state law. Indeed, these decisions involve the interplay between the TCA and local laws, not instances of conflict between state and local laws. *See, e.g., Sprint Spectrum, L.P. v. Willoth,*

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Finally, the City does not assert that the Decision of the New York Court of Appeals conflicts with relevant decisions of this Court.

In sum, the City fails to cite to any authority for its fanciful proposition that the TCA requires local government regulation of wireless communication infrastructure siting over state law. It is clear then that the TCA is not inconsistent with the Decision of the New York Court of Appeals, which held that the State's utilization of its property is immune from local government regulation. Given the lack of merit to the City's argument concerning the first purported federal question, this Court should deny the Petition.

II. There Is No Conflict Among State Courts Of Last Resort On An Important Federal Question

In a final bid to secure review of the first purported federal question by this Court, the City endeavors to create a conflict among state courts of last resort concerning the applicability of local law on wireless telecommunications facilities sited on state-owned land. Although the court of last resort in Virginia, *see Board of Supervisors of Fairfax County, Virginia v. Washington, D.C. SMSA L.P.*, 522 S.E.2d 876 (Va. 1999), and an intermediate court in Ohio, *see GTE Wireless v. Anderson Township*, 731 N.E.2d

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176 F.3d 630 (2d Cir. 1999) (reviewing locality's denial of application for wireless telecommunications facility under the TCA); *Omnipoint Communications Enters., L.P. v. Newtown Township*, 219 F.3d 240 (3d Cir. 2000) (same); *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998) (same); *Omnipoint Communications, Inc. v. Common Council of the City of Peekskill*, 202 F. Supp. 2d 210 (S.D.N.Y. 2002) (same).

201 (Ohio Ct. App.), *appeal dismissed sua sponte*, 718 N.E.2d 447 (Ohio 1999),[6] considered the issue of whether certain wireless telecommunications facilities that were constructed on state-owned property were subject to local law and reached contrary conclusions, importantly, neither court addressed the TCA.[7] Indeed, as was the case here, the courts in these two matters resolved the issue pursuant to their respective state's statutes and decisional law. In sum, although the court of last resort in Virginia and an intermediate court in Ohio considered the issue of whether certain wireless telecommunications facilities that were constructed on state-owned property were subject to local law, since both holdings were predicated on state law grounds and neither court addressed the TCA, there is no conflict among state courts of last resort on an important federal question.[8]

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[6] Although the City misleadingly states that the "[t]he Supreme Courts of both Virginia and Ohio have considered this issue yet arrived at different outcomes," (Pet. at 1), importantly, the Supreme Court of Ohio simply dismissed an appeal from this decision on the grounds that no substantial constitutional question was presented and that a discretionary appeal, if applicable, was not allowed. *See* 718 N.E.2d 447 (Ohio 1999). Thus, contrary to the City's assertion (Pet. at 1, 14), the Supreme Court of Ohio has not "decided" the issue of whether the TCA requires the application of local law to wireless telecommunications facilities located on state-owned land.

[7] It should also be noted that there are substantial factual differences between these decisions.

[8] In the course of discussing the above decisions from Virginia and Ohio, the City cites to *Omnipoint Communications, Inc. v. Common Council of the City of Peekskill*, 202 F. Supp. 2d 210 (S.D.N.Y. 2002), noting that "[a] federal court in New York has held that the location of personal wireless service facilities on public property is subject to local zoning regulations." (Pet. at 12 n.2). *Omnipoint* is inapposite to the instant action for a number of reasons; most importantly, the dicta the City references from *Omnipoint* concerns the City's attempt to use its

(Continued on following page)

III. The Second Purported Federal Question Was Never Presented To Or Decided By The State Courts Below And, In Any Event, Is Not An Important Question Of Federal Law

This Court has long held that, in order to even have jurisdiction over a particular issue, the subject federal question must be raised, preserved, and passed upon in the state courts below. *See, e.g., Cardinale*, 394 U.S. at 438. Here, the City's second purported federal question was never presented to or passed upon in the State courts below (Pet. App. 1a-20a; 21a-25a). Indeed, the City readily and fatally concedes that the Decision of the New York Court of Appeals "*does not address* the claim that the State violated the Telecommunications Act by extending its immunity to those carriers located on state owned [sic] land to the clear disadvantage of other telecommunications carriers who are required to comply with local regulations in order to operate in the City of New Rochelle." (Pet. at 3 [emphasis added]). Thus, this Court lacks jurisdiction to review the Decision of the New York Court of Appeals insofar as it relates to the second purported federal question. *See, e.g., Street v. New York*, 394 U.S. 576, 582 (1969); *Cardinale*, 394 U.S. at 438-439; *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); 28 U.S.C. § 1257.[9]

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own land within its own boundaries without regard to its own zoning regulations, *not*, as here, the State's use of State-owned land within a subdivision (*i.e.*, the City) of that State's boundaries.

[9] To the extent that the City attempts to rescue this issue by responding that Supreme Court, County of Westchester held in its November 13, 2001 Order that there is no "basis to find that either DOT or Crown have violated the prohibition in the TCA against discrimination among cellular service providers," (Pet. App. at 29a),

(Continued on following page)

Although this purported issue was never presented to or passed upon in the State courts below, in the event that this Court nevertheless considers it, the City's argument does not raise an important question of federal law as it is without merit.

The City's argument on this purported federal question is grounded in the anti-discrimination provision of section 332(c)(7)(B)(i)(I). Importantly, however, the City lacks standing to assert any rights under section 332(c)(7)(B)(i)(I) as it was enacted to protect telecommunications providers from unlawful denials of applications to site a facility, *not* citizens, municipalities, or other non-providers who are aggrieved by a determination to permit a facility. *See Mason v. O'Brien*, No. 1:01-CV-1556, 2002 U.S. Dist. LEXIS 19456, at *8-10 (N.D.N.Y. Sept. 30, 2002). Nor does this provision confer an implied right of action upon non-providers. *See id.* at *10-16.

Regardless of the lack of standing under section 332(c)(7)(B)(i)(I), the City has made no effort to demonstrate how the State has unreasonably discriminated against any wireless carriers. This is because the State has not favored one commercial carrier over another and space is available on the State's towers to all applicants on a non-discriminatory basis. Indeed, the TSMA requires that Crown "shall not unreasonably discriminate among

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that Order is *not* the basis of the instant Petition. Indeed, although the City served a notice of appeal from this Order, the City failed to perfect the appeal. As a result, the appeal was dismissed by the Appellate Division, Second Department on November 6, 2002. *See supra* at n.2. Instead, the Order underlying the instant Petition is dated June 28, 2002. (Pet. App. 55a-57a). Critically, this Order is silent on this purported federal question.

providers of functionally equivalent services. TSMA § 11(A).[10]

In sum, even if the second purported federal question had been properly presented to and decided by the State courts below, the City's underlying argument in support of this issue is without merit. Thus, this issue is not an important federal question either.

CONCLUSION

Accordingly, the Petition for a writ of certiorari should be denied.

DATED: June 10, 2005
Albany, New York

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[10] To the extent that the City complains that the Decision of the New York Court of Appeals is contrary to the terms of the TSMA (Pet. at 14), of course, this is not a federal question suitable for this Court's review.